

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
IN RE: ETHICON, INC.	:	MDL No. 2:12-MD-2327
PELVIC REPAIR SYSTEM	:	
PRODUCTS LIABILITY	:	
LITIGATION	:	DATE: August 9, 2013
	:	
	x	

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE HELD  
BEFORE THE HONORABLE CHERYL A. EIFERT  
UNITED STATES MAGISTRATE JUDGE  
HUNTINGTON, WV

APPEARANCES:

(All counsel appearing by telephone.)

For the Plaintiffs:	BRYAN F. AYLSTOCK, ESQ. D. RENEE BAGGETT, ESQ. ERIC WALKER, ESQ. BENJAMIN ANDERSON, ESQ. Aylstock Witkin Kreis & Overholtz Suite 200 17 East Main Street Pensacola, FL 32502  THOMAS P. CARTMELL, ESQ. Wagstaff & Cartmell, LLP Suite 300 4740 Grand Avenue Kansas City, MO 64112
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For the Defendants:	BENJAMIN M. WATSON, ESQ. GARY RUBIN, ESQ. WILLIAM M. GAGE, ESQ. DONNA B. JACOBS, ESQ. Butler Snow O'Mara Stevens & Cannada, PLLC P. O. Box 6010 Ridgeland, MS 39158-6010
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(Appearances continued:)

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\*\*\* Proceedings transcribed from Courtflow recording by:

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Charleston, WV 25301

1 PROCEEDINGS had before The Honorable Cheryl A. Eifert,  
2 Magistrate Judge, United States District Court, Southern District  
3 of West Virginia, on August 9, 2013, at 1:55 p.m., as follows:

4 JUDICIAL ASSISTANT: Hello. This is Laura Tatman,  
5 Judge Eifert's judicial assistant.

6 MR. AYLSTOCK: Hi, Laura. This is Bryan Aylstock.

7 JUDICIAL ASSISTANT: Hi, everyone.

8 MR. AYLSTOCK: We've got a bunch of folks on the call.

9 JUDICIAL ASSISTANT: Okay, and I was going to ask you,  
10 as this is on the record, if we could just start with plaintiffs'  
11 counsel and each person announce their names slowly so the  
12 courtroom deputy can pick that up, we'll do that first, and then  
13 I will connect you with the judge.

14 MR. AYLSTOCK: Okay. This is Bryan Aylstock on behalf  
15 of the plaintiffs.

16 MR. WALKER: Eric Walker with the plaintiffs.

17 MR. CARTMELL: Tom Cartmell with the plaintiffs.

18 MR. BAGGETT: Renee' Baggett with the plaintiffs.

19 MR. ANDERSON: Ben Anderson with the plaintiffs.

20 MR. THOMAS: David Thomas and Phil Combs for  
21 defendants.

22 COURTROOM DEPUTY CLERK: Who was that again, I'm sorry?

23 MR. WATSON: Ben Watson, Donna Jacobs and William Gage  
24 for defendants.

25 MR. RUBIN: Gary Rubin for the defendants.

1 JUDICIAL ASSISTANT: Is that everyone?

2 MR. AYLSTOCK: That's everyone from our side, Laura.

3 This is Bryan for the plaintiffs.

4 JUDICIAL ASSISTANT: All right.

5 MR. WATSON: And for the defendants as well.

6 JUDICIAL ASSISTANT: All right. Thank you.

7 If you'll hold one moment, I will connect you with Judge  
8 Eifert.

9 MR. AYLSTOCK: Thank you so much.

10 JUDICIAL ASSISTANT: Thank you.

11 (Pause.)

12 THE COURT: Good afternoon.

13 MR. AYLSTOCK: Good afternoon, Your Honor.

14 MR. WATSON: Good afternoon, Your Honor.

15 MR. THOMAS: Good afternoon, Your Honor.

16 THE COURT: I understand there's a number of people on  
17 the telephone and I would just ask that when you are speaking, if  
18 you would identify yourself so that that will be clear on any  
19 transcript that's made.

20 MR. AYLSTOCK: Sure will, Your Honor. This is Bryan  
21 Aylstock.

22 THE COURT: All right. So what I'd like to start doing  
23 is having conferences like this once a week and I understand that  
24 perhaps Friday afternoons are the most convenient time for  
25 counsel; is that true?

1 MR. AYLSTOCK: For was plaintiffs, Your Honor, this is  
2 Bryan Aylstock. It's as good as any, and we'll certainly make  
3 sure to make ourselves avail and, just by wait of introduction,  
4 Eric Walker is on the phone. He's relatively new to the Ethicon  
5 litigation, but he was heavily involved in a lot of briefing and  
6 argument in some other MDL's. So he may be involved in some of  
7 the argument when -- either when we're out or just because he did  
8 a lot of the briefing.

9 THE COURT: Well, we welcome him to our little group  
10 here.

11 MR. WALKER: Thank you, Your Honor.

12 THE COURT: Now let me hear from Mr. Thomas or Mr.  
13 Combs or one of the defense counsel. Would Fridays work well for  
14 you all?

15 MR. THOMAS: As well as any other, Judge.

16 THE COURT: And -- all right. And I think I understood  
17 perhaps the afternoon is better than the morning; is that true?

18 MR. THOMAS: As well as any other time.

19 THE COURT: Okay. All right. Then I'm just going to  
20 -- I'll just set them at my convenience. It sounds like that  
21 that will work for everybody.

22 Next Friday, we can either do it at 1:00 or 4:00 in the  
23 afternoon, and I do -- I do want to make clear that what I'm  
24 anticipating is to have a conference that lasts no more than one  
25 hour. So, tell me, what would you all prefer, 1:00 or 4:00 on

1 the 16th?

2 MR. AYLSTOCK: For the plaintiffs, this is Bryan again.  
3 We're good with either.

4 THE COURT: All right. Mr. Thomas, Mr. Combs, do you  
5 have any preference?

6 MR. THOMAS: Your Honor, if I may ask my counterparts,  
7 do you have a preference?

8 MR. WATSON: Yes. This is Ben Watson. I think, for  
9 next week, we would prefer the 4:00 slot, if possible.

10 THE COURT: Certainly. All right. I will set it then  
11 for Friday, the 16th, at 4:00 and then, after that, I'll just set  
12 them sometime in the afternoon on Fridays and, what I'll do is  
13 issue an order that just sets a few out in advance so everybody  
14 knows what time and, as I think Laura may have told you, it's not  
15 necessary for everyone to be in every conference, as long as  
16 there is somebody representing each side that would have a  
17 leadership role in the case, and I'll leave that up to you all,  
18 as to who those people might be.

19 So let's talk about what's going on now. Who would like to  
20 go first?

21 MR. AYLSTOCK: I'll start, Judge. This is Bryan  
22 Aylstock and, first, let me say thank you for -- for having these  
23 calls. We had actually discussed maybe having weekly calls with  
24 the defense, but I think that it is very helpful having your  
25 direct involvement just to keep us all on track and -- and moving

1 forward with the production and with the various issues and just  
2 getting your thoughts. So I'll start by saying thank you for  
3 that.

4 We do have a number of issues that remain outstanding, Your  
5 Honor, after our Motion to Compel. In particular, you had  
6 suggested that each side need to file some briefs on some issues.  
7 The XUS brief was filed last Friday per the order.

8 We had had a conference call a week ago Thursday on some --  
9 on the hernia mesh and sales rep issues, and Ms. Baggett can  
10 speak to the sales rep issues, but the hernia mesh issues remain  
11 outstanding and immediately, or at least a few hours after that  
12 call, I did send a proposal to Mr. Watson on, you know, maybe  
13 limiting those requests to certain of the RFP's that we would be  
14 willing to do pursuant to his request and Mr. Gage's request that  
15 we do that and I haven't heard anything at all.

16 And the hernia mesh issues are really becoming much -- you  
17 know, I'd certainly want to stress the importance at our Motion  
18 to Compel. It's even more important to us given some recent  
19 depositions in this case and some testimony and some documents  
20 that -- that have been produced. So we would urge that, although  
21 that motion, I think, should have been filed Friday, we -- I  
22 don't know what else to do, other than to tee up the issue, and  
23 I'd like to tee it up as quickly as possible, if we could.

24 THE COURT: Well, Mr. Watson or Mr. Gage, what has  
25 happened with the suggestions from the plaintiff as to some

1 limitations?

2 MR. WATSON: Yes, Your Honor. This is Ben Watson. I  
3 -- we did have an extensive call last week with Mr. Aylstock and  
4 I think we do have close to an agreement in principle in terms of  
5 what we will produce on the hernia side. You know, we obviously  
6 want to do a production that they're satisfied with on hernia  
7 mesh, so we're in no way saying that we're not going to produce,  
8 you know, the basic documents, I think, that they are looking  
9 for.

10 Mr. Aylstock in his proposal basically cut out, I don't  
11 know, I'd say about a third of the document requests saying, we  
12 don't want hernia mesh related to these, but we do want hernia  
13 mesh, you know, related to the other two-thirds and we had sent  
14 that on to our team and our client and have been talking about it  
15 and I think it generally is something that we can agree to.

16 What I -- what we are in the process of doing, and I had  
17 hoped to have it out before the call today but, of course, I have  
18 not, is to basically delineate what it is that we will be  
19 producing. We've got a list of about thirty-something custodians  
20 because I don't know what -- they know what's there a lot better  
21 than I know what's there.

22 So if they're producing -- if those represent and they can  
23 certify, yes, these are the documents after a diligent search  
24 that are responsive to the RFP's related to hernia, then great.  
25 Then -- then it sounds like we have a resolution, but if they're



1 saying that we want to do this in lieu of responding to the RFP's  
2 after a diligent search, then I don't think we can agree to that.  
3 I -- I don't know.

4 THE COURT: The thirty custodians, where did that come  
5 from? Were questions -- did you ask requests that were specific  
6 to various custodians, or is this just a method by which they are  
7 going to search for these documents?

8 MR. AYLSTOCK: No, Your Honor, not for specific  
9 custodians. We asked for documents related to certain issues.

10 THE COURT: All right. So you have -- so where do the  
11 -- where do the thirty custodians come from, Mr. Watson?

12 MR. WATSON: Well, Your Honor, in terms of trying to  
13 determine who is at the company that has responsive documents,  
14 these are the people that seem to be the most likely to have it  
15 and they have been put through an interview process to determine  
16 what it is that they have and, based on that, you know, their  
17 custodial collections are being made and that's, you know, from  
18 our standpoint, at least on the custodial side, really the only  
19 way to figure out who it is at the company that has the relevant  
20 documents.

21 THE COURT: Well, so as I -- what I hear you saying is  
22 that you do intend to answer the requests and you believe the way  
23 to do that is through these thirty custodians that you're  
24 identifying and --

25 MR. AYLSTOCK: Yes, Your Honor. Yes, Your Honor. Not

1 just -- I mean that's just a piece of it. You know, obviously,  
2 that's the central point to it as well, you know, because  
3 their -- you know, their discovery requests go to -- go to, you  
4 know, many different issues and, you know, whether it's adverse  
5 events, or design history files, or whatever. Those are the  
6 things that -- that satisfy those as well.

7 THE COURT: All right. Well, I think probably the best  
8 thing to do is for you to, as soon as possible, and certainly,  
9 you say Tuesday would be the latest, you need to let Mr. Aylstock  
10 know what exactly it is you're going to respond to and whether  
11 you are limiting the document productions in any way and then we  
12 need to -- if you are and he disagrees with your limitations,  
13 then the briefing needs to be done quickly, because he's right.  
14 I mean that should have already been done at this point.

15 MR. WATSON: Yes, Your Honor.

16 THE COURT: So let's try to -- you know, let's -- no  
17 later than Tuesday, but if you can do it sooner, then don't delay  
18 because I think we'll have to be in a position next Friday to  
19 have -- I want to specifically know what it is you're producing  
20 and when you can produce it, how long it will take you to produce  
21 it, and what specific limitations the plaintiff disagrees with  
22 and maybe we won't have to do a whole lot of briefing on it.  
23 Maybe we'll be able to just discuss it next Friday.

24 MR. WATSON: Yes, Your Honor.

25 THE COURT: All right.

1 MR. AYLSTOCK: That would be my -- my hope, Your Honor.

2 THE COURT: Okay.

3 MR. AYLSTOCK: Would the Court permit me to inquire of  
4 Mr. Watson, because he raised an issue that -- you know,  
5 normally, we're not supposed to ask the opposing counsel a  
6 question, but I wasn't sure how formal I could be.

7 THE COURT: No. Let's -- I'd prefer to be a little  
8 informal. I'd like to try to get these things resolved.

9 (Recording stops due to technical difficulties.)

10 THE COURT: I do want you to know we're back on the  
11 record. So we are back on the record.

12 So go ahead and ask Mr. Watson what you'd like to ask him.

13 MR. AYLSTOCK: I guess my concern with what you said,  
14 Ben, was that, you know, with the custodial production, I  
15 understand that that -- you know, that's part of our production,  
16 but it sounded like for all of these requests, not just related  
17 to hernia, the way that you responded to the request was through  
18 this custodial and central source production, as opposed to doing  
19 a sweep of the company, and that might feed into some of these  
20 other issues that we're having with why documents seem to be  
21 missing and then why we continually follow up and so it's --

22 Is that right on -- for all of the production? Is this a  
23 custodial-based production or did you produce, you know -- did  
24 you -- did you produce all the documents or just all the  
25 documents that were within the custodial file?

1 MR. WATSON: No, Bryan. These custodial sources are  
2 just a piece of it. We've produced now from 290 custodians and,  
3 as of a couple of days ago, you all asked us to produce another  
4 one, which we're going to do. That's only one piece of it.

5 Obviously, the -- let's see, the 136 central sources that  
6 we've produced from as well, certainly, you know, is a -- is a  
7 robust production and I'm not sure I understand what your -- what  
8 your issue is with it.

9 MR. AYLSTOCK: Well, okay. I guess -- I guess I'm --  
10 when you produce with the custodial production, are you -- you're  
11 just using search terms or how do you -- how do the documents get  
12 produced when you find them?

13 MR. WATSON: Well, their full environments are  
14 selected. That is every electronic and paper environment that  
15 they have, whether it be their hard drive, their -- you know,  
16 their shared space on a network drive or, you know, even the hard  
17 copy documents that are saved in their office, the full  
18 environment is collected and then the search terms that we all  
19 agree to are applied against that data and then those documents  
20 are reviewed and produced.

21 MR. AYLSTOCK: Okay. Well, I think this is a bigger  
22 issue than I had thought, because I'll give the Court another  
23 example. We did the 30(b)(6) deposition of Dan Lamont, who is  
24 the individual that was in charge of some risk -- you know, the  
25 medical device reporting and there was this Corrective and

1 Preventive Action Plan, CAPA, related to some deficiencies in  
2 their risk assessment related to these medical devices and -- and  
3 I don't think that was ever produced and --

4 THE COURT: Well --

5 MR. AYLSTOCK: And so if we're just doing a search term  
6 search, I'm not sure that that's --

7 THE COURT: Well, did you --

8 MR. AYLSTOCK: I mean that might be feeding into some  
9 of these other issues that we can get to.

10 THE COURT: Okay.

11 MR. AYLSTOCK: But I just wanted to flag that.

12 THE COURT: Well, I haven't gone back and looked at  
13 your ESI protocol, but didn't you, in the protocol, address these  
14 kinds of issues?

15 MR. AYLSTOCK: Yes, Your Honor.

16 THE COURT: So I guess what we'll need to do is go back  
17 to the protocol and see whether that is being complied with  
18 because --

19 MR. AYLSTOCK: It's just --

20 THE COURT: I don't --

21 MR. AYLSTOCK: I'm sorry, Judge.

22 THE COURT: Whenever you have a case with this much in  
23 the way of documentation, I don't think it's feasible to expect a  
24 defendant to review every single piece of documentation there is  
25 across the world to find every -- I mean that's why you do

1 representative searches and so forth. So I'm not sure I'm  
2 understanding what your --

3 MR. AYLSTOCK: Yes.

4 THE COURT: What your problem is with that.

5 MR. AYLSTOCK: I guess I was just unclear whether they  
6 were searching everywhere in the company and -- or simply the  
7 custodians using it and it sounds like, other than the central  
8 source files, it's the central source or the -- the enumerated  
9 custodians, which might be enough. I just wanted to understand  
10 it better.

11 THE COURT: Okay.

12 MR. AYLSTOCK: Because I think it might be feeding into  
13 some of these other issues.

14 THE COURT: All right. Well, so we'll go back and look  
15 at the ESI protocol and make sure that the defendant is complying  
16 with that, but if they are, then I'm not certain what else you  
17 can expect out of them.

18 MR. AYLSTOCK: Okay.

19 THE COURT: What would be the next -- what's the next  
20 issue we've got concerns with?

21 MR. AYLSTOCK: Well, this one just happened today,  
22 Judge. We had been requesting exemplar products of, in  
23 particular, the original TVT Retropubic product, as well as the  
24 TVT-O and some other ones, the most urgent, of course, being the  
25 TVT and TVT-O, given the expert deadline of September, and we've

1 requested them for many weeks.

2 I followed up with Ms. Jones -- I know she's out of the  
3 country -- a couple of weeks ago, and then another one, and Ms.  
4 Jones indicated to me yesterday that she thought it had been  
5 done, but didn't get notice. I guess they were in Butler Snow's  
6 possession, but she didn't know about it.

7 Anyway, we get the box today and it does have exemplars, but  
8 they're opened. The boxes are literally opened. In fact,  
9 there's handwriting from somebody on them that says, "Open, but  
10 complete." I'm holding one in my hand, with handwriting, of an  
11 open box with stuff rattling around in it and the way these come,  
12 as hermetically sealed, then now -- I mean we're going to give  
13 these to our experts for some testing, but the fact is, they're  
14 not -- they're not -- they're not testable.

15 They could be skewered on cross examination, if they're  
16 doing degradation testing or some other testing, that these  
17 really weren't the products in pristine condition. All the boxes  
18 are opened and look like they've been sitting around and we've  
19 been asking for six, eight weeks, and I need good product. I  
20 needed it six or eight weeks ago. I certainly need it by today  
21 to get to our experts to do some testing.

22 THE COURT: Yeah. That's --

23 MR. AYLSTOCK: And these are products --

24 THE COURT: That's a very legitimate request. What's  
25 the problem with that?

1 MR. GAGE: Your Honor, this is William Gage. I, in  
2 Christy's absence, shipped those out yesterday at her request.  
3 This is news to me. This is the first I've heard of it. I don't  
4 know why the boxes were opened and I don't know if that's an  
5 aberration or irregularity.

6 So I think what I would ask Bryan to do is to communicate  
7 with me as soon as this call is over, help me understand what  
8 they've got, and then we'll get about the business of getting it  
9 replaced.

10 I would say -- I would say that it's my understanding that  
11 they have -- the plaintiffs have had exemplars, three exemplars,  
12 for a number of months. So these were additional exemplars that  
13 they had requested.

14 THE COURT: Well, it ought not to be that difficult to  
15 get a regularly packaged exemplar to provide to them. I mean I  
16 don't understand why this would be at all difficult.

17 MR. GAGE: Judge I -- Judge, I'll be honest with you.  
18 I have no idea. I mean I true -- this is the first I have heard  
19 of this. I had no -- I have no idea why they would not have been  
20 sealed in the way that they would be sealed when they come off  
21 the assembly line.

22 THE COURT: Well, let me --

23 MR. GAGE: But I mean it --

24 THE COURT: Mr. Aylstock --

25 MR. GAGE: Now --



1 THE COURT: Mr. Aylstock?

2 MR. AYLSTOCK: Yes, Your Honor? Yes, Your Honor?

3 THE COURT: So you've gotten some exemplars of TVTs and  
4 TVT-Os and they're all opened? The packages are all opened?

5 MR. AYLSTOCK: The packages are -- the boxes are open  
6 and the seal is broken. For some of them, the inner-seal is also  
7 broken and there's stuff rattling around. For other ones, you  
8 know, the way that they -- and we -- Mr. Gage is right. We did  
9 get a couple of exemplars that we've been, you know, bringing to  
10 court and so forth, but -- but the -- they usually come, you  
11 know, in shrink wrap basically.

12 THE COURT: Uh-huh.

13 MR. AYLSTOCK: So there's no suggestion that anybody  
14 has tampered with anything and, obviously, we want to be careful  
15 with chain of custody and we want to do good -- good testing.

16 THE COURT: Right.

17 MR. AYLSTOCK: So I'm happy to get on the phone. I  
18 just wanted to highlight the issue because it's -- it's a -- I  
19 think it's symptomatic of a larger problem and we've got expert  
20 deadlines and I'm just concerned about meeting them and we may  
21 need some time additionally.

22 THE COURT: Well, Mr. Watson -- or Mr. Gage, I don't  
23 know what else there would be to talk about on the phone. He got  
24 the products. They're opened. Why can't you just arrange to  
25 send him some new ones that are not opened?

1 MR. GAGE: That's -- that's exactly right, Judge.

2 THE COURT: So let's -- let's get that done.

3 MR. GAGE: We will, indeed.

4 THE COURT: All right. Thank you. And let's get it  
5 done as soon as possible. That shouldn't be hard to do.

6 MR. GAGE: I'm going to call the client as soon as we  
7 get off this call, Judge.

8 THE COURT: Great.

9 All right. What's our next issue?

10 MR. AYLSTOCK: The next issue, Judge, relates to this  
11 professional education materials that we've been talking about.  
12 In fact, I've got the transcript from the May 23rd hearing, where  
13 Ms. Jones and I have exchange with you about these professional  
14 education materials and she said that, you know, she's understood  
15 that she gave us the -- you know, we have the list of the final  
16 education materials.

17 Of course, I went through mand I won't belabor the point  
18 about the deposition and getting another list right before the  
19 deposition and discovering that list wasn't good and following up  
20 and, three weeks later, getting another list and -- and it was  
21 brought up at the Motion to Compel hearing, and I have that  
22 transcript, where Mr. Watson indicates that we've given them  
23 everything we're able to locate and we've given them the list  
24 and, to our knowledge, it's -- it's right.

25 And so, you know, relying on that, we've been moving forward

1 and so forth and, the other day, we found some other what appear  
2 to be final SKU numbers. Those -- you know, the tracking numbers  
3 for some more professional education materials and bring those to  
4 Mr. Watson's attention and he indicates that, well, these --  
5 these are additional media and, although he's, I guess, spent a  
6 lot of time on it, and I know he's doing his best. I'm not  
7 personally attacking Mr. Watson, but I -- the e-mail indicates,  
8 well, yeah, these should have been on, pretty much, but if you'll  
9 give us some more examples, we'll go back and check and we just  
10 can't operate like that when we're trying to -- their defense to  
11 why the IFU or the label doesn't have certain things, one of  
12 them, their corporate designee says, well, it's all in the  
13 professional education.

14 Well, I've looked in the professional education, everything  
15 I can find and, generally speaking, they don't talk about risks,  
16 at least a lot of the ones that we've identified that they knew  
17 about, and so we've got this impossible situation where we can  
18 never be sure what the professional education materials are.

19 We had this exchange and one of the things that was  
20 suggested, I -- was, well, since we have copy review forms for  
21 each of these, they ought to be able to be matched up and I don't  
22 have that. I don't -- I have no confidence of what is complete  
23 or not complete.

24 The only thing I have from the defendant is, well, if you'll  
25 find more examples of final product, we'll confirm that those are

1 final product or final professional education pieces, and I don't  
2 think that's appropriate and I think that they need to tell me  
3 definitively what those professional education materials are. We  
4 asked for it specifically. You know, not only our RFP's, but our  
5 interrogatories, which I understand they need to answer today and  
6 maybe we'll get an answer to that question that's complete today.  
7 I hope so. If so, then I can stop talking.

8 But I need a final answer about what the final professional  
9 education pieces are from the defendant because this has been  
10 like going on since May and depositions have been taken of not  
11 only witnesses, but treating physicians and, of course, they  
12 don't remember exactly what they got and -- and it's putting us  
13 again in the -- and part of our experts' reports may be talking  
14 about the failure to adequately train and how can they give a  
15 report if they don't know what the final training materials are?

16 THE COURT: Mr. Watson?

17 MR. WATSON: Your Honor, this is -- yes. This is Ben  
18 Watson, Your Honor. The copy review process applies to all  
19 professional education materials. The professional education  
20 materials, before they can be used, have to go through the copy  
21 review process and we have produced the copy review files for  
22 these products, which include the professional education  
23 materials.

24 We've produced the entire copy review index that has all of  
25 the copy review materials, not just the professional education,

1 but all of the copy review materials and, Your Honor, I cannot  
2 emphasize how many hours we have spent ourselves trying to  
3 determine what the final versions are of the professional  
4 education materials, primarily the slide decks that are used in  
5 professional education and, as best we can do it, we have given  
6 them several iterations of charts.

7 Mr. Aylstock is right that we've added things to it, you  
8 know, as we find them and the problem is, Your Honor, that we're  
9 in the same boat that they are. We don't have a way,  
10 particularly back before this was electronic, before 2009 and the  
11 GPM Blue database. We don't have a way ourself to do it, other  
12 than to manually go through it and do the best we can, and that's  
13 -- and that's what we have tried to do.

14 Now I think the important point here is that in Mr.  
15 Aylstock's last request, he came up with several different pieces  
16 of professional education material. I believe -- I believe they  
17 were -- one was corporate media and one was perhaps some  
18 flashcards and they asked if they've been produced and, of  
19 course, they been because the copy review materials have been  
20 produced.

21 So we are doing our best to -- to come up with what the  
22 final versions are and, as I told Mr. Aylstock the other day in  
23 an e-mail, you know, we -- we are adding to that chart,  
24 particularly the portable media that has already been produced.

25 So, you know, we're -- we're kind of -- like I said, we're

1 in the same boat that they are, trying to put these pieces  
2 together as well, which is -- which is unfortunate and it's  
3 difficult, but we are doing our best on it.

4 THE COURT: And, Mr. Aylstock, I think, as I recall  
5 this issue, and we've addressed this many times, there is really  
6 nothing that the Court can do to make someone produce something  
7 that they don't have. So if they don't have an index, or they  
8 don't have a way of telling when these things were in use, I  
9 can't compel them to produce that. I think the best you might be  
10 able to do is just under Rule 37(c), if they fail to supplement,  
11 they fail to disclose something, then they won't be able to use  
12 it if it's to their benefit.

13 You know, you may just -- you may have to get to a point  
14 where you do a request for admissions and you've now supplied all  
15 of the -- to me, all of your professional education materials.  
16 You've supplied all of the in-use dates that you have available.  
17 If you have none available, admit that, and then, if they try to  
18 come up with something after that that helps them, you'll be able  
19 to get it excluded, but I don't know -- I don't know what else I  
20 can make them do.

21 MR. AYLSTOCK: Well, Judge, what the witnesses have  
22 testified is that the copy review forms are attached to the  
23 documents or, you know, they're -- before this Blue system, they  
24 were in a file cabinet, but they were all attached, and we had  
25 this discussion at the Motion to Compel and, you know, if there

1 -- if they were attached and they're able to be tracked, which  
2 they have to be able to be tracked because, in order to put  
3 something out there, Legal signs off, Marketing signs off, Risk  
4 Management signs. All of these people have to sign off before  
5 it's final.

6 Why can't they produce to us in the format that they clearly  
7 have, or have an index for, these are the people that signed off  
8 on these things and here's the forms and they're all in one  
9 place?

10 To make us go find stuff and then wonder, because what we  
11 found didn't have a copy review form attached to it, well, is  
12 this final, is it not, and so I asked Mr. Watson, well, here's  
13 some more stuff. You gave me something you said was final and  
14 then he's got to -- somehow, somebody in the company was able to  
15 look at that and say, oh, yeah, that's final, and I'm sure they  
16 did it by looking at some copy review form or something. So give  
17 us that, that your company clearly uses, to know what the final  
18 professional education pieces are.

19 THE COURT: So, Mr. Watson --

20 MR. WATSON: And, Your Honor --

21 THE COURT: Yes. Tell me what's happened. I think, if  
22 I recall, didn't some of these copy review forms get disconnected  
23 from other materials and so you've got these review forms, but  
24 you don't know which materials they go to and things like that?

25 MR. WATSON: That --

1 MR. AYLSTOCK: And you had suggested, you know, Mr.  
2 Watson put them together for us.

3 THE COURT: Yes. Why can't you?

4 MR. AYLSTOCK: And we don't know.

5 THE COURT: I mean is there no original anywhere or no  
6 -- I don't know if these are hard copies, or these are electronic  
7 documents, but is there no -- no place where they're together?

8 MR. WATSON: Your Honor, for the hard copy, I guess we  
9 need to divide it before 2009 and after 2009. After 2009, it's  
10 in -- it's electronic. It's in the GGM Blue database and, as I  
11 understand it, there is no actual copy accrual form. It's, you  
12 know, a field essentially that's in the -- in the database. So I  
13 don't think from '09 forward, it's a large problem.

14 I think where the problem comes up is prior to 2009, where  
15 they are in hard copy, and for the -- for the copy review files,  
16 as I understand it, when you go through each file, some of them  
17 have copy review forms and some of them do not and, as you go  
18 through each individual file, it's my understanding that just in  
19 the way that they've been produced, it's very difficult and, in  
20 some cases, can't be done to match them up.

21 So, again, it's a hugely time-intensive task that we have,  
22 you know, tried to do our best to match up these copy review  
23 forms or to tell them through a chart what the final -- what the  
24 final version is.

25 THE COURT: So if -- the way I picture it, there is



1 this big file cabinet somewhere with all of these various  
2 education materials and they're all grouped together when they  
3 were used together and with them is a copy review form and what  
4 you're telling me is that somehow, these things have all become  
5 separated, so they don't exist? They no longer exist as they  
6 used to in that now we don't know what copy review form goes with  
7 which group of educational materials?

8 MR. WATSON: Right. I think you've got a file for a  
9 particular job, whatever -- whatever the piece may be, you've got  
10 a file for that and, in some cases, the copy review form is there  
11 in that file, in some cases it's not, and it -- for whatever  
12 reason, the way that those files are maintained, is essentially  
13 how those are missed.

14 THE COURT: Okay. Well, I don't know, Mr. Aylstock,  
15 what else I can make them do.

16 MS. BAGGETT: One more point, Your Honor. This is  
17 Renee' Baggett, and Mr. Aylstock can probably elaborate on it,  
18 but just because the documents -- these materials were copy  
19 reviewed doesn't actually mean they were actually used either.  
20 So we have no way to discern that either.

21 THE COURT: But do the -- does the defendant have a way  
22 to discern that? I hear them saying they don't.

23 MR. WATSON: Your Honor, that's -- this is Mr. Watson.  
24 That's my understanding as well, that it would have to -- the  
25 number of people at the company, how can we tell what was in use,

1 when it was in use, and what they tell us is we just don't have a  
2 way to do that. We have the copy review files, but beyond that,  
3 that's -- that's not something that we can do.

4 MR. AYLSTOCK: Your Honor, just -- I mean just to play  
5 this out, I mean their witnesses, when we say, well, how come the  
6 IFU doesn't talk about painful sex? You know. You knew back in  
7 1998 that it caused painful sex and the regulations require you  
8 to warn of everything that you know about or should know about  
9 and so how come? And they say, well, it's in the professional  
10 education.

11 And so now we're -- we're in an impossible situation where,  
12 one, you know, I've looked at them and they don't -- you know,  
13 it's -- generally, they just have a slide with the risks in the  
14 label, which are minimal, and then it's just doctors talking or  
15 people talking. So, but how do I -- how do I -- what am I  
16 supposed to do to defend that and say, no, it's not in there or  
17 this is what was used or what was not used?

18 So they had it and, bear in mind, there were litigation  
19 holds in this back in 2004 and 2003. So they have it in a file  
20 cabinet in a way that it could be easily found, was Mr. Lisa's  
21 testimony, up until 2009. It's all in one cabinet file cabinet,  
22 he says, and now they have a new database, this Blue database.

23 It's kind of like the SOP issue, where they have a database  
24 to figure out all this stuff, that they can go to a terminal. I  
25 said, well, Mr. Lisa, can you -- you know, once the database

1 happened, can you go find it? Oh, yeah, it's easy. Well, if  
2 it's easy, then give us the database and if you destroyed the  
3 file cabinet or you put it in a way that now you can't find  
4 what's used or not used, then you shouldn't get to make that  
5 defense at trial, because it's just not fair.

6 THE COURT: Well, and that -- and that may be true.  
7 That -- that may be -- that may be a motion in limine that you'll  
8 want to make or -- you know, I -- I think if you've got a witness  
9 saying it's in the professional education information and you've  
10 looked through all of it that's been produced and it's not there,  
11 I don't see how they're going to claim it was in there. I mean I  
12 don't --

13 MR. AYLSTOCK: But what they might do, Judge --

14 THE COURT: It seems like that helps you.

15 MR. AYLSTOCK: I didn't mean to interrupt. Sorry.

16 THE COURT: I mean you've got all the documents. If  
17 it's not in the documents, they've told you these are the  
18 documents. If you've got the documents and that particular risk  
19 isn't in there, I mean I don't know why you would want to keep  
20 pressing them to try to find something that has the risk in  
21 there. How does that really help you?

22 MR. AYLSTOCK: Well, I don't think it does, but what I  
23 don't want to have happen, Judge, is because they haven't given  
24 me a final list and they claim that they can't, that they pull  
25 some document out of the nine million pages that was marked

1 something without a copy review form and say, A-ha, it was  
2 produced. I didn't tell you about it and you could have found  
3 the needle in the haystack. I'm just trying to find the needle  
4 in the haystack now, as opposed to being surprised at trial with,  
5 well, it was in there somewhere.

6 THE COURT: Well, I mean I -- I don't know what else to  
7 do on this one. I think perhaps if they haven't given you the  
8 information, or they've somehow buried that information, that  
9 that's going to require a motion later, perhaps a 37(c) motion or  
10 something like that, but, you know, I hear them saying they don't  
11 -- they've given you everything that they can give to you and  
12 they have no other way to match anything up and it doesn't exist  
13 anymore in a format where they could actually reconstruct it.  
14 They just have to sit down and do the same thing you're doing.

15 I mean I understand your frustration, believe me, because it  
16 is a little hard to believe that a corporation would not do a  
17 better job of keeping its documents in an orderly fashion but,  
18 you know, the reality is, a lot of corporations don't.

19 You know, I don't know what else -- tell me what -- tell me  
20 what I could do that would help you, Mr. Aylstock.

21 MR. AYLSTOCK: Is -- maybe I could ask Mr. Watson, can  
22 you produce the entirety of the Blue database?

23 MR. WATSON: Well, it has materials about many other  
24 products, not just the products at issue here, and my  
25 understanding is we've produced what's in the Blue database for

1 these products. So I'm not sure what else would be in there that  
2 -- that you would want.

3 MR. AYLSTOCK: Well, I think the database, the reason  
4 for a database is you can search for stuff because the guy, Mr.  
5 Lisa, said you just go to it, type something in and, you know,  
6 maybe -- maybe a site visit where we can go poke around in the  
7 Blue database or something, but I mean I guess maybe it's just an  
8 issue for a motion later, but I'm just trying to avoid that, if I  
9 can.

10 THE COURT: Well, is the problem with what you've  
11 gotten from the database or is it with what you've gotten that  
12 pre-dates the database? I thought the problem was with the  
13 pre-2009 documentation.

14 MR. AYLSTOCK: It's both because even -- yeah, they've  
15 produced stuff out of the database, but it's still not the copy  
16 review forms. Even post-2009 aren't attached to anything.

17 THE COURT: But he says there were no copy review  
18 forms.

19 MR. WATSON: That's correct, Your Honor. 2009 forward,  
20 there are no copy review forms, is my understanding, and it's  
21 just a -- you know, essentially a field in the database where the  
22 approval is given. It's done electronically instead of in paper  
23 form.

24 THE COURT: So when you produced the physician  
25 education materials from the database, did you include that field

1 that shows when the approval was done or that the approval was  
2 done?

3 MR. WATSON: Your Honor, I have not personally looked  
4 at that, but I can certainly verify that.

5 THE COURT: Yes. Why don't you check that, because I  
6 don't know what the field shows, if it shows who approved it, the  
7 date it was approved, just that it was approved, but it seems  
8 like that would be information that Mr. Aylstock ought to be  
9 given if it's available to you.

10 MR. AYLSTOCK: If it has,

11 MR. WATSON: Yes.

12 MR. AYLSTOCK: -- then I haven't seen it and I've  
13 looked. That doesn't mean I'm perfect to search it, but I  
14 certainly have looked, and I haven't seen it.

15 THE COURT: Okay.

16 MR. WATSON: There may just be a disconnect that either  
17 side doesn't know perhaps what it's looking at. So we can  
18 certainly verify that and, if not, give it to them.

19 THE COURT: All right. Let's do that.

20 All right. Are there any other issues? We still have some  
21 time.

22 MR. AYLSTOCK: Yes, Your Honor.

23 THE COURT: All right.

24 MR. AYLSTOCK: On the sales rep, I think Ms. Baggett  
25 was going to just briefly give the Court an update on a couple of

1 issues.

2 THE COURT: Certainly.

3 MS. BAGGETT: Yes, Your Honor. This is Renee' Baggett.  
4 We had a meeting, a meet-and-confer, last week with the defendant  
5 at the same time we discussed the hernia production issues and,  
6 at that time, we were -- that was last Thursday and our brief  
7 would have been done -- due on Friday. So I called the Court and  
8 requested a week extension because we had -- based on our call,  
9 we had thought up a way of addressing the issues. The parties  
10 agreed that we might -- could do a stipulation as to certain  
11 matters in lieu of doing the brief.

12 We sent down the stipulation this past Wednesday and  
13 requested a telephone conference as well to discuss this so that  
14 we could avoid having to file the brief to this date, but we have  
15 not heard back from them on that. So, I -- as I said, our brief  
16 is due today, so I guess that's what we're going to be doing, is  
17 filing the brief.

18 THE COURT: Well, let's -- before you rush to file it  
19 today, I'll give you some extra time, but let's find out what has  
20 happened with the stipulation.

21 MR. WATSON: Yes, Your Honor. We received it Wednesday  
22 afternoon and we have sent it on to our client to review, but  
23 since Wednesday afternoon, we unfortunately just have not had a  
24 chance to sit down and talk with them about that to make sure  
25 that they are okay with it, but we can do that in short order

1 and, if we do have any problems, we can certainly highlight them  
2 quickly.

3 THE COURT: All right. We've got to get moving on some  
4 of these things. You know, it seems to --

5 MR. WALKER: This is Eric Walker. I hate to interrupt  
6 and I apologize. Beyond what their client might object to, are  
7 there attorney objections to the stipulation, because I assume  
8 the attorneys have looked at it. I'm just trying to figure out  
9 what I can do.

10 I'm the one who wrote the stipulation and will be handling  
11 the motion, this is Eric Walker, and if there are attorney  
12 problems with it beyond just the client saying, you know, we  
13 can't do this for logistical reasons or something, I would like  
14 to hear those, if we could.

15 MR. WATSON: Well, I think one of my issues, Eric, was  
16 the broad paragraph in there that says that essentially, once we  
17 get past the bellwethers, we do a rolling production after we get  
18 those, maybe a hundred at a time or something along those lines,  
19 and I think we're concerned about the breadth on that.

20 MR. WALKER: Well, I mean, you know, here's -- here are  
21 my issues, if I can have just a few minutes, Judge.

22 To me, the sales representative documents are among the most  
23 important in any of these litigations, just based on my  
24 experience in these, and it's really not based on the sales rep  
25 note that involve a particular bellwether doctor. It's based on



1 what they reveal about what the company knew and what the company  
2 did.

3 I mean I can tell you, having done a number of these, that  
4 what happens is, if we come up with a document from a sales  
5 representative who called on a doctor who said, you know, this  
6 risk isn't great. This benefit is wonderful and, of course, it's  
7 all un-improved, it's inconsistent with the label, blah, blah,  
8 blah, we hear the claim, well, that's a renegade sales rep. It's  
9 something that is way beyond what we authorized, but when you  
10 actually look at the notes from the other sales representative,  
11 you see that that's essentially a company policy.

12 So what we -- what is proposed is a very -- you know, I'm  
13 happy to negotiate with them on a means of limiting the burden on  
14 them, but we really do think that the rep notes from people other  
15 than the doctors who are involved in the bellwether cases are  
16 critical in this regard.

17 Plus, we can't seem to get notes and information from the  
18 reps who called on the bellwether documents. There seems to be  
19 missing documents. In some instances, you know, thousands of  
20 pages of missing documents. So that's kind of where we're at.

21 But in the end, this litigation largely boils down to what  
22 the company's policy was. Certainly, to prove punitive damages  
23 claims and negligence, we have to show not just that some sales  
24 rep said something, because they will claim that's not something  
25 they authorized, but what the company did, and we need more than

1 just the notes that involved the bellwether doctors and I'm happy  
2 to work with them on a way we can have a rolling production that  
3 minimizes the burden to them, but the notion that the call notes  
4 that are relevant are only those call notes related to the few  
5 doctors involved in the bellwether cases, if we can even get  
6 those which, so far, we haven't been able to, that's not the call  
7 notes that are relevant. It is the call notes of the doctors as  
8 a whole.

9 THE COURT: All right. Well, let me ask, is it Mr.  
10 Watson who is handling this one as well?

11 MR. WATSON: I think so, Your Honor.

12 THE COURT: All right. Mr. Watson, when are you --  
13 when will you be able to get a definitive answer from your client  
14 as to the stipulation?

15 MR. WATSON: I can give it to them on Monday.

16 THE COURT: Monday?

17 MR. WATSON: Monday, Your Honor.

18 THE COURT: All right. And let's do this. When you  
19 hear from your client, why don't you contact Mr. Walker and have  
20 a telephone conversation about what needs to be tweaked or  
21 changed or negotiated so you can get moving on it.

22 MR. WATSON: Certainly.

23 THE COURT: And then -- all right. And then, Ms.  
24 Baggett, let's assume you get a response from them, a definitive  
25 response on Monday as to -- as to what they're willing to do and

1 you disagree with it and you want to file a brief. How many days  
2 after Monday will you need to get your brief finished?

3 MS. BAGGETT: I'll defer back to Mr. Walker since he's  
4 --

5 MR. WALKER: Within two days, Your Honor.

6 THE COURT: Two days? All right. So I'll just, at  
7 this point, give you an extension until Wednesday to get your  
8 brief done, assuming you hear what you need to hear on Monday.

9 MR. WALKER: Thank you, Your Honor.

10 THE COURT: No matter what --

11 MS. BAGGETT: Thank you.

12 THE COURT: Yes. You can have two days to file a  
13 brief. That's not very long at all. So --

14 MS. BAGGETT: Thank you.

15 THE COURT: Okay. And, Mr. Watson, let's get some  
16 response to them on Monday.

17 MR. WATSON: Yes, Your Honor.

18 THE COURT: All right. What else do we have?

19 MS. BAGGETT: Well, real quick, before we move on to  
20 the other topic, I just also wanted to give you a heads up that  
21 probably today or -- or on Monday, at the latest, we're going to  
22 be filing a motion regarding some privilege issues. Certainly,  
23 we have some issues with some of the documents that have been  
24 determined to be privileged, but that's coming next, either today  
25 or Monday.

1 THE COURT: Okay.

2 MR. WATSON: The same day.

3 THE COURT: All right. Well, I'll look for that.

4 MR. WATSON: Yes, Your Honor. We've met and conferred  
5 extensively on that. I think there are five or so documents that  
6 were on each challenge.

7 THE COURT: Okay. Well, that should be fairly easy  
8 then. Five is a lot better than 500.

9 Okay, what else?

10 MR. AYLSTOCK: Your Honor, this is -- this is Bryan  
11 again. If I could introduce Ben Anderson, I think you probably  
12 know him from the many hearings, but he's handling a lot of the  
13 case -- or the experts related to degradation and defective  
14 product. So he had some issues and follow-up to some of those  
15 other slides and study materials we brought up in the Motion to  
16 Compel a few weeks back.

17 THE COURT: All right.

18 MR. ANDERSON: Yes. Hello, Your Honor. I took the  
19 deposition of Dan Berkeley back in May and he was the one who had  
20 conducted a seven-year degradation study and it was the only  
21 study that had ever been conducted by Ethicon per his testimony  
22 and, as you know, whether or not the polypropylene degrades in a  
23 woman's pelvis is a huge point of contention in all of these  
24 cases and so, being the only one that had ever done a study, and  
25 the only degradation study, we had extensive deposition testimony

1 over that.

2 And I asked him about the study itself, which was just a  
3 report, and in doing the report, he -- they did FBM, or high  
4 magnification photographs of the materials, and I asked him if he  
5 still had those and he said yes. And I said, "Where are they",  
6 and he said, "Tower 109." And I said, "Is that somewhere you go  
7 every day", and he said, "Virtually every day."

8 I asked him where the back-up was for the testing that was  
9 done in order to determine that there was, in fact, degradation  
10 and he said, "It's in the same place", and so I told counsel, Mr.  
11 Paul Davis, I said, "I'm not -- I don't believe this has been  
12 produced and I would ask that all of these things be produced."

13 And, at one of the breaks, he said, "I've already, you know,  
14 contacted my client and we should be able to tell you where those  
15 are and whichever ones have not been produced, we'll be able to,  
16 you know, get those produced to you." I said, "That sounds  
17 great."

18 I followed up with him with an e-mail in May and listed the  
19 parts of the testimony and everything that we had requested and  
20 said, "We need this." I got nothing.

21 I sent him another e-mail. He sent it up past the powers  
22 that be.

23 July rolls around. On July 2nd, I sent another e-mail to  
24 whom I believe might be the powers that be, that being Christy,  
25 Donna, William, and I -- I believe Dave Thomas as well, and said,

1 "Guys, you know, time's a wastin'. I'd really like these  
2 materials." He identified them and he said where they were. I  
3 have gotten nothing back from that.

4 It was the point of -- some of the meet-and-confer and  
5 Motion to Compel items that were addressed with Your Honor, I  
6 sent another follow-up e-mail after that and I've gotten nothing  
7 in that regard. So I would ask that the defendants do what I  
8 asked them do at the deposition that day back in May, and that is  
9 to go to the tower where he says they are or have Mr. Berkeley do  
10 it and provide us with copies of the FEM photographs, as well as  
11 the backup data that I asked for specifically to support their  
12 study.

13 They claim that their -- that their polypropylene doesn't  
14 degrade in the human body and they used this study, this one  
15 study, as their -- as their back-up for that and we should be  
16 allowed to look at that and have our experts look at it and we're  
17 going on, you know, two, three months now and we have nothing.

18 THE COURT: Yes. So I agree. Where are those  
19 materials?

20 MR. WATSON: Your Honor, this is Ben Watson. I think I  
21 can short circuit most of this. Mr. Aylstock and I exchanged  
22 some e-mails on this earlier this week and I believe Mr. Anderson  
23 was copied. Part of those materials were produced last week, I  
24 believe on July 31st, and we have again gone to Mr. Berkeley and  
25 he has located, you know, what we think is the rest of the

1 materials and those will be produced today. So they'll be going  
2 out today.

3 THE COURT: Okay, but, you know, and while that's  
4 wonderful that you're getting these things produced, it does seem  
5 like it took you a terribly long time to do it. Why would it  
6 take that long, if this man knew exactly where the information  
7 was? It's been, what, two and a half months.

8 MR. WATSON: Yes, Your Honor. I agree with that.  
9 Unfortunately, I think it was a -- it's not an excuse, but I  
10 think it was an internal breakdown on our team and I apologize  
11 for that.

12 THE COURT: Well, we've got to stop with the internal  
13 breakdowns because we're not -- we're not moving if there's  
14 breakdowns. It sounds like you guys have a lot of  
15 meet-and-confers, so I can't imagine that there's all of --  
16 always these huge communication breakdowns. It just sounds to me  
17 like things aren't getting done, for some reason or another.  
18 Maybe you're just overwhelmed, I don't know, but that -- that  
19 kind of thing, it's just too long.

20 MR. WATSON: Yes, Your Honor. I --

21 THE COURT: I don't want to have to award sanctions.  
22 You know, I tend to be a little less inclined to award sanctions,  
23 but Judge Stanley trained me that I'm supposed to be awarding  
24 these sanctions and she had no fear in doing that and I'm going  
25 to have to follow her lead because she was the original

1 magistrate on this case and so that's the -- these cases, and so  
2 that's the only fair thing to do.

3 MR. ANDERSON: And the next issue, Your Honor, and  
4 hopefully, those will be produced today and it will be in  
5 conformance. I did not see an e-mail on July 31st, so I was not  
6 copied on that and perhaps -- perhaps some of the things have  
7 been produced thus far. I certainly have not seen the issues.  
8 So, hopefully, that will remove the issue. If not, I guess we'll  
9 take it up again next week with Your Honor.

10 THE COURT: Okay.

11 MR. ANDERSON: The next issue in that regard is also  
12 under this area of degradation, is there was an outside company  
13 that Johnson & Johnson hired called PA Consulting, who came in in  
14 November of 2010 and looked at the issue of erosion with  
15 Ethicon's meshes, and they did a very lengthy report that ended  
16 up being compiled in June of 2011 and, in that report, their  
17 outside consultant, Professor Klosterhalfen, looked at the issue  
18 of degradation and it is mentioned in the report and they talked  
19 about how the "images on file", that's a quote, "images on file  
20 by -- show that there is degradation of fiber."

21 So I asked another witness about that back in June, a Chris  
22 Vailhe, about those images and where they were and he said he had  
23 seen those images at one point in time and he took something that  
24 he believed was in a report over to a lab and showed them to  
25 "Bob" in the lab, last name unknown, and he showed them to Bob



1 and Bob said, "No, I don't think that shows degradation."

2 I said, okay, where are those? I would like to see those.  
3 We had asked for these repeatedly in New Jersey and never gotten  
4 them and now, in this litigation, we're asking for them and have  
5 not gotten them.

6 Now, Mr. Thomas had told me at the bellwether hearing that  
7 he was looking into it and then after the Bacca and Holtz  
8 (phonetic) depositions last week, he would come back to me on it.  
9 I have not yet heard from him, but I know he's been on the road  
10 and so I assume it's something he is looking into and hopefully  
11 is about to resolve, but again, it's something we need our  
12 experts to look at and time's a wastin'. So, hopefully, Mr.  
13 Thomas has got a response for us and can report on that now.

14 THE COURT: Yes. Mr. Thomas, you've been way too quiet  
15 today anyway.

16 MR. THOMAS: Well, that's because Mr. Anderson just put  
17 me on the spot. Just to be fair, this was a request that came up  
18 at the end of July. Mr. Anderson and I were in New York for --  
19 well, I was in New York for eight days for depositions. He  
20 attended part of them. I asked for additional time to deal with  
21 it while we were in New York.

22 I got back the first of the week and I have made inquiry,  
23 made some connections. I don't have an answer yet. I hope to  
24 have one soon.

25 THE COURT: All right. Well, that sounds like a pretty

1 prompt effort on Mr. Thomas's part. So, hopefully, he'll have  
2 something to share with you soon. If he hasn't gotten back with  
3 you by next Friday, then make sure you put that on the list of  
4 things we need to talk about.

5 MR. ANDERSON: Thank you, Your Honor. I'll do that.

6 The next item on my matter is animal studies and  
7 pre-clinical testing, both pathology slides, as well as any  
8 tissue blocks or explanted tissue and this came up the first time  
9 at a deposition in October of 2012 by their 30(b)(6) and their  
10 pre-clinical person, Dr. Thomas Barbolt, and we began asking  
11 Ethicon back in October of that year, last year for those.

12 It continued in through December and it continued in through  
13 this year, such that we were guided by that when we did our  
14 discovery in the MDL to be sure to include it in that, so that  
15 anything that would be produced in New Jersey, would also be  
16 produced in the MDL and vice versa because we are asking for the  
17 exact same thing.

18 As you might anticipate or may already know, Ethicon used  
19 their, quote-unquote, "animal studies", or pre-clinical studies,  
20 as the basis for making certain claims like, "Bidirectional  
21 elasticity incorporates well into the surrounding tissues,  
22 doesn't show an intensive inflammatory response, has adequate  
23 pore size to allow for tissue ingrowth," and the list goes on. I  
24 won't bore you with them, but they're very important to this  
25 litigation because they make certain claims that we have a right

1 to go and verify.

2 So when I put deponents in the chair and I ask them  
3 questions about it, it would be awfully nice if we had discovery  
4 we've been asking for so that we could have our experts look at  
5 the actual pathology slides and look at the mesh with the tissue  
6 in it to see if what they are claiming is there, is actually  
7 there.

8 And so this has been an ongoing thing and I would like to be  
9 able to come to some resolution of it because, even if we have  
10 to, say, cut off half of the tissue blocks and then preserve --  
11 preserve them and send them through with a chain of custody form,  
12 that's fine, but pathology slides should be able to be put into a  
13 tube and sent to us. It's not -- we are not, you know,  
14 reinventing the wheel and breaking new ground. It happens in  
15 every litigation and so here we are butting up against, you know,  
16 six weeks away from our expert reports or five weeks and I still  
17 don't have anything in this regard.

18 THE COURT: Who can -- who can speak to that?

19 MR. WATSON: Your Honor, this is Ben Watson. I think  
20 this goes back to the issue we talked about at the hearing a  
21 couple of weeks ago. You know, it's our position that tissue  
22 slides just are not something that should be produced. You know,  
23 in many cases, they're many years old. You know, there are some  
24 newer ones and there are some older ones.

25 But at least in our experience, this is something that

1 generally we haven't been asked to do before and, you know, the  
2 -- you know, the data says what it says. The report says what it  
3 says, but, you know, to go and actually get the tissue slides and  
4 figure out, you know, how they're going to be divided, chain of  
5 custody, all of that sort of thing, we think that it's just  
6 something that's not necessary.

7 THE COURT: Well, I --

8 MR. ANDERSON: But with all due respect, Your Honor --

9 THE COURT: Yes.

10 MR. ANDERSON: I've been involved in these litigations  
11 for a quarter century and we've been producing slides when I was  
12 on the defense end and have received them on the plaintiff's  
13 side.

14 THE COURT: Yes.

15 MR. ANDERSON: And the whole idea behind pathologists  
16 doing the slides is because they don't degrade over time. They  
17 are what they are. It's a way of taking something and making it  
18 stand still in time and they know full well that there's things  
19 that we learn from those going back as far as twenty, thirty,  
20 fifty years and, certainly, within the last 15 years, H&E  
21 staining is H&E staining. It is what it is.

22 THE COURT: Right. Now I hate to interrupt you, but I  
23 do, I agree with you. I think that if you -- if defendant has  
24 slides that form the basis of a study, or of a representation, or  
25 of marketing, whatever it would be, that the plaintiff has a

1 right to view those slides.

2 I think, as I recall when we discussed this last time, the  
3 whole question was about preservation, whether there were, for  
4 example, blocks, sufficient blocks that you could make re-cuts,  
5 whether there -- there was a way to handle the exchange of this  
6 information without it being destroyed or lost or in some way  
7 tainted and I thought that's where we left it, was there were  
8 going to be some discussions about how this could take place.

9 I mean even if you have to agree on a laboratory somewhere  
10 and bring your experts in to look at it all at the same time,  
11 there's got to be a way to do this.

12 I did not understand that the defendants had an objection to  
13 sharing this information and I don't really -- I don't understand  
14 how you could have an objection. It seems to me that this is a  
15 valid -- this is valid information for the plaintiff to be able  
16 to discover.

17 MR. WATSON: Your Honor, this is Ben Watson. I  
18 understand your point and, you know, to move this along, if  
19 they'll identify the specific slides or blocks for -- that they  
20 -- that they're interested in, then I think we'll be able to work  
21 together to find a way to make that happen.

22 MR. ANDERSON: And we have done that repeatedly and  
23 we're happy to send it, the exact same thing again with the exact  
24 study that we're asking for, and we will ask for them again, but  
25 certainly, we don't want to be in a position, Your Honor, to

1 where they come in at trial and they say, no, we have -- we've  
2 done studies and here are the slides, or here's what we saw from  
3 those studies, and we don't have a chance to verify those.

4 THE COURT: Right.

5 MR. ANDERSON: And so we will identify as many as we  
6 see, but also, it's also in the nature of you claim in your -- in  
7 this particular warning, or in this particular brochure, animal  
8 studies have shown blank.

9 Okay, where are those animal studies and where's the tissue  
10 blocks or the samples that support that claim so that we can go  
11 out and verify it. We have that burden and so we would ask that  
12 -- I will -- I will send again to Mr. Watson the things that  
13 we've been requesting and see if whatever issues they have, that  
14 we can tee those up by Monday or Tuesday and, if we don't have  
15 resolution, then that will be something that we put also on the  
16 agenda for next week.

17 And a related issue is we found out in the deposition just  
18 last week that there's actually ex-planted hernia mesh that was  
19 sent in to Ethicon and then was sent out to Professor  
20 Klosterhalfen for him to review. The importance of that, of  
21 course, Your Honor, is that the same PROLENE hernia mesh that  
22 Ethicon made for their hernia repair is the exact same PROLENE  
23 hernia mesh that is used in all of the TVT devices.

24 Therefore, if it's doing something untoward in the tissue  
25 and it's being sent out to look at because of erosions, or

1 chronic inflammation, or chronic pain, then that's obviously  
2 something that we need to discover and determine the relevance of  
3 and, when we found out that, that was in complete contrast to  
4 other depositions that we had taken, other Quality Affairs people  
5 who said, "We never receive explanted mesh at Ethicon. Never."

6 And so it was a bit eye-popping when I heard that, and so my  
7 question then was, counsel, will you agree to produce that,  
8 because the witness has said, well, it's not our -- it's not our  
9 -- it's not our proffer. It goes directly to Professor  
10 Klosterhalfen and he reports it to us, and I said, yes, but this  
11 came to your company first. You agree that that's just as much  
12 your proffer as his, and the witness said, well, of course.

13 So we would ask that included in this would be that any of  
14 the hernia mesh -- or hernia mesh explants and any reporting on  
15 that that was done by Professor Klosterhalfen, that he, or we, be  
16 allowed to access those as well. So I'm going to put that as  
17 part of my request to Mr. Watson.

18 MR. THOMAS: Your Honor, this is David Thomas. I was  
19 at the deposition last week when that happened. Those issues  
20 were identified. This is the first time that Mr. Anderson has  
21 made a request for any of those samples and just make that clear.  
22 This is the first time that that request has been made on the  
23 record here today.

24 THE COURT: Okay.

25 MR. AYLSTOCK: Judge, this is Bryan Aylstock again.

1 I'm looking at the transcript from the Motion to Compel hearing  
2 and what the Court said is, "What I'd like to do, Ethicon, is  
3 within seven days, I want you to check and see if there are  
4 materials you have not produced responsive to this request and be  
5 copied to the plaintiffs. For items that can't be reproduced,  
6 you need to outline what those are and then meet about how to do  
7 it," and we still don't have that list.

8 And the fact that we're learning stuff at a deposition on a  
9 list that you ordered to be produced within seven days, it --  
10 we'd like a list of all the pathology materials that -- that you  
11 ordered to be produced so then we can figure out what we need and  
12 how soon we can get it.

13 THE COURT: Yes. I think it --

14 MR. AYLSTOCK: So we did make the request.

15 THE COURT: I do think that if you have testing and  
16 you've got materials from that testing and you made  
17 representations based on that testing about these particular  
18 products, that you need to figure out what you've got and how  
19 that can be shared with the plaintiffs and, apparently, I already  
20 said that. So I don't disagree with myself this week. I think  
21 you ought to -- you ought to be doing that.

22 You know, as far as the hernia mesh, I'm not, at this point,  
23 prepared to address that because I still am not clear on what  
24 we're agreeing to and not agreeing to about the hernia mesh. So  
25 I'd like to put that sort of on the back burner, that piece of



1 hernia mesh.

2 Let's talk about and let's get something done on these  
3 pathology slides, or tissue blocks, or whatever you have on these  
4 pre-clinical studies that Ethicon performed. So, yeah, we need  
5 to get moving on that.

6 MR. AYLSTOCK: I agree.

7 THE COURT: I mean they have a right to discover that.  
8 It may turn out that it's not admissible. It may turn out that  
9 they can't use it, but I mean discovery is so broad that I don't  
10 see how you can think that you wouldn't have to share that. So  
11 let's get it worked out.

12 MR. ANDERSON: The last topic is very quick, and that  
13 is, Your Honor, that our expert, Professor Klinge as well as the  
14 expert in Bard and who I just mentioned, Professor Klosterhalfen,  
15 they were both consultants to Ethicon on their hernia mesh, as  
16 well as on their surgical meshes and looking at things like  
17 animal testing and other things.

18 There was a tremendous amount of back-and-forth information  
19 that went between the two of them. In working with Professor  
20 Klinge and being a former Ethicon consultant, he has said, "I had  
21 lots of -- lots of e-mails that went back and forth and reporting  
22 that went back and forth between myself and Professor  
23 Klosterhalfen and Ethicon."

24 We have searched the databases. We find very, very little  
25 in terms of communication going back and forth. And for

1 Professor Klinge, it was over ten years of work and for Professor  
2 Klosterhalfen, almost twenty.

3 And so if -- I'm going to make a renewed request that  
4 anything between the two of them be produced and/or that they  
5 allow whatever confidentiality agreement existed, and there was  
6 confidentiality agreements that were signed, that related to any  
7 developing products and things like that, that they be allowed to  
8 produce them themselves.

9 One way or another, we should be able to get our hands on  
10 the information that was flowing between these two world-renowned  
11 scientists and Ethicon regarding surgical mesh, not just hernia  
12 mesh, but their meshes in tissue that they used to validate a  
13 number of things and the claims that they make. So I just wanted  
14 to let Your Honor know that that one was going to be on the table  
15 as well.

16 THE COURT: Well, all right. We'll have to address  
17 that. I don't -- you know, I don't have the background  
18 information on the professor and this other gentleman and what --  
19 what kind of connection they had with Ethicon, if there were  
20 written contracts, if they were just out there.

21 I mean I don't know that Ethicon even has the e-mails that  
22 would have been changed between these two people. So I  
23 definitely would need to have some more background information to  
24 know, you know, whether that's something they would have and what  
25 right they would have to it. I don't have that in front of me at

1 this point. So you may want to --

2 MR. ANDERSON: Right.

3 THE COURT: You may want to flush that out some and, I  
4 don't know, does anyone on the defendants' side have anything  
5 they wish to say about that topic? It's awfully quiet. No  
6 comments?

7 MR. GAGE: Your Honor, I -- the only thing I -- this is  
8 William Gage. The only thing that I would say is I didn't -- I  
9 wasn't quite sure I understood what Mr. Anderson was saying and I  
10 just kind of wanted to get some clarification, if I could, just  
11 so that when we look into this issue, we'll know better what he  
12 was saying.

13 Was Mr. Anderson saying that based on the MDL document  
14 production, and/or New Jersey document production, there's  
15 nothing or virtually nothing that constitutes -- are we talking  
16 about e-mails from Dr. Klinge and/or Klosterhalfen to an employee  
17 of Ethicon? Is that what you were saying, Ben, was what you were  
18 concerned was not present?

19 MR. ANDERSON: Yeah, William, there are some, but --  
20 but they are very limited. A couple of examples would be the  
21 2008 and 2009 Klosterhalfen explant studies, but also, there's  
22 e-mail changes or studies that they worked on dating back to the  
23 -- back to the 90s in Russia and other places, and I'm not  
24 finding a lot of those things in the database and, as you know,  
25 I've been at this a pretty long time, for two and a half years,

1 and so we continue to look for things, hoping that they will come  
2 up in other production. They haven't.

3 And so given that you've spoken up, perhaps you and I could  
4 talk about this further and see what we could come up with and if  
5 we -- if it's not being produced for some reason or you feel it  
6 has been produced, then maybe we can figure out a way to address  
7 the issue and then, if we can't come to terms on it, then we'll  
8 see if we can get some help from Judge Eifert. How does that  
9 sound?

10 MR. GAGE: I agree. Let's try to do that on Monday  
11 and, certainly, if Dr. Klinge and Klosterhalfen are your experts,  
12 then we're going to want to get their computers as well, so we  
13 can ourselves get the e-mail tracking with Ethicon.

14 THE COURT: Yes, that sounds like a good idea because,  
15 really, I don't even -- as I said, I mean I'm not sure if Ethicon  
16 even was -- had access to this e-mail exchange or these e-mails  
17 you're talking about. So why don't you all talk and then, if you  
18 want to raise it next week, just put that on your agendas and  
19 we'll talk about it.

20 MR. ANDERSON: That would be fine.

21 MR. GAGE: Your Honor, this is William Gage again.  
22 Just one final thought that I would have for Your Honor's  
23 consideration. As these calls go forward weekly, and I really  
24 like this, because it just -- it gets down to the lick log and  
25 let's get this stuff done.

1           Could we request that the parties -- or would Your Honor  
2           consider asking the parties to exchange an agenda of just the  
3           issues they wish to -- wish to discussing with Your Honor on the  
4           Friday call maybe by Wednesday at noon or close of business on  
5           Wednesday so that we can ensure that we have a day to go find the  
6           appropriate person on our team to be able to respond to whatever  
7           that agenda item is?

8           For example, if Mr. Thomas had not been on the call today,  
9           we would not have been able to respond to a particular issue.  
10          You know, and the composition of who attends the call may change  
11          from week to week, but -- but we should, if we can get the agenda  
12          just 24 hours or 36 hours in advance, that would let us try to  
13          track down more information on that item for the call.

14          THE COURT: That makes a lot of sense to me. Why don't  
15          you do that. Why don't we say noon on Wednesday to exchange your  
16          agenda items and you don't -- you don't need to send them to me.  
17          Just exchange them with each other and that's a good idea. That  
18          will give you a chance to have a little preparation and maybe we  
19          can even get more done.

20          MR. GAGE: Thank you, Your Honor.

21          MR. AYLSTOCK: That sounds good, Your Honor.

22          MR. WATSON: Yes, Your Honor.

23          THE COURT: All right. Well, I think that we've done  
24          a good bit of work today, which is good, and I'm going to just  
25          issue an order that talks only about scheduling. I'm not going

1 to do an order that confirms anything we've discussed here today.

2 I think, if you want orders like that in the future, that we  
3 ought to -- you ought to tell me at the time we're having the  
4 conference because what I -- what I really plan with these are  
5 they're not so much motions and arguments and so forth. It's  
6 just all of us trying to work out these issues and so I was  
7 considering these to be a little less formal.

8 Now you will have transcripts, of course, so is that -- does  
9 that sound acceptable to everyone? No orders, really, no formal  
10 orders, just discussion and transcripts or --

11 MR. AYLSTOCK: Yes.

12 THE COURT: Is that all right for everyone?

13 MR. AYLSTOCK: Yes, Your Honor. Bryan Aylstock.

14 THE COURT: Okay.

15 MR. AYLSTOCK: I mean, I think in some circumstances,  
16 we might ask for one and I think, you know, we'll certainly put  
17 that on the record.

18 THE COURT: All right. If you do want an order about  
19 something specific, let me know, and -- I'm sorry.

20 MR. WALKER: Your Honor, this is Eric Walker. I just  
21 wanted to add that while I -- you know, on the agenda issue, just  
22 in case there is some issue that comes up, you know, where --  
23 something comes up where there was an agreement that something  
24 would be reached by Wednesday at noon and it hadn't been, maybe  
25 there would be an exception to that, just so there's not an

1 absolute rule on that, but generally speaking, everything would  
2 be on an agenda by noon.

3 THE COURT: Right. As I said, my point is to keep  
4 these somewhat informal.

5 MR. WALKER: Yes.

6 THE COURT: So that we can talk through these things  
7 and try to move forward. So, yes, if something -- if something  
8 happens Thursday morning that's important and it's not on your  
9 agenda, but you really feel like you need to bring it up, I'm not  
10 going to say you can't do that because it wasn't on your agenda.  
11 Now you may not get much of an answer from the other side, but at  
12 least we can raise the issue and maybe decide where to go with  
13 it.

14 MR. WALKER: Thank you, Your Honor.

15 THE COURT: All right. Thank you all. I appreciate --  
16 I really do appreciate all of your cooperation and the fact that  
17 you're really trying to work together and I know this is tough.  
18 I know there's a lot of material. You're on a tight schedule. I  
19 understand all that. So I appreciate the time that you're giving  
20 to me and I will talk to you then next week, if not before.

21 MR. AYLSTOCK: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MS. BAGGETT: Thank you.

24 THE COURT: Bye-bye.

25 MR. WATSON: Thank you. Bye.

(Proceedings concluded at 3:18 p.m., August 8, 2013.)

CERTIFICATION:

I, Ayme A. Cochran, Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the matter of In re: Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation, MDL Case No. 2:12-MD-2327, as recorded on July 17, 2013 and subsequently transcribed by me.

s/Ayme A. Cochran, RPR, CRR

August 13, 2013

Ayme A. Cochran, RPR, CRR

DATE